No. 12060

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNA HARRIS and MORRIS HARRIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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Respondent Confuses the Partnership Issue.

The Respondent, at pages 8 and 9 of his brief, has cited a long list of cases which he claims support his statement that "this case follows the usual pattern" of family partnership cases. There are several points in this connection which merit further discussion by the Petitioners.

It has been said many times by the Courts that these partnership cases are each to be decided on its own facts and that the citation of cases is not particularly helpful. We have already cited those cases which we believe estab-

lish the correct rules to be followed in arriving at a decision here and it would be a waste of the Court's time to analyze the Respondent's cases individually.

All of the cited cases arose under the old Dobson rule (*Dobson v. Commissioner,* 320 U. S. 489) which limited the right of the appellate court in its review of the facts. This rule has now been changed by Congressional action (Public Law No. 773, section 36) so that decisions of the Tax Court are now reviewable to the same extent as those of the District Court in non-jury civil actions.

The foregoing comments are particularly applicable to the two cases cited from this Circuit. In *Nordling v. Commissioner,* 166 F. 2d 703, this Court, referring to the findings of the Tax Court, said, "These findings are supported by evidence and we are without authority to overturn them." *Quon v. Commissioner,* 165 F. 2d 215, was affirmed without opinion. Furthermore, these cases are clearly distinguishable from ours on the facts.

Nordling, in exercising an option to buy his partner's interest in the business, instructed his attorney to insert his wife's name in the contract as a co-purchaser and followed by making her a partner. It appears this was done on the advice of a tax consultant purely for the purpose of reducing income taxes. In our case, the partnership was formed following discussions extending over a period of several months, and the record is clear that its effect on income taxes was given no consideration whatsoever.

An examination of the memorandum decision of the Tax Court in the *Quon* case, found at paragraph 47,077 of the 1947 Prentice-Hall Tax Court Memorandum Decisions service, reveals that the purpose and intent of the parties was, through the creation of trusts as partners, to provide security for children aged 11, 9, 5, and 4 years, respectively, to transfer title to a substantial part of the business to citizens in order to forestall freezing of the assets belonging to an alien, and to reduce income taxes.

Thus, in neither cases did there appear a bona fide intention to carry on business as partners, whereas the undisputed evidence in our case is that such was the intention.

The Respondent has thoroughly confused the principles to be gleaned from the Supreme Court decisions in *Commissioner v. Tower,* 327 U. S. 280, and *Lusthaus v. Commissioner,* 327 U. S. 293. After referring to the statement that the absence of capital or services contributed by the questioned partner are circumstances which may properly be considered by the Tax Court, he draws the unwarranted conclusion that they are the only circumstances which need be considered. As already pointed out in Petitioners' opening brief, supported by several cases, the issue is not so limited.

The Respondent, in attempting to distinguish, on the facts, the cases cited by Petitioners in their opening brief, not only misses the point, but ignores completely the recent Tax Court decisions in *Isaac Blumberg,* 11 T. C. ......, No. 80, *William Collins, Sr.,* para. 48,241 P-H Memo T. C.,

and *August J. Fischer,* para. 48,230 P-H Memo T. C. cited at pages 25 and 26 of Petitioners' opening brief.

The purpose of citing authorities in a case such as this, which is to be decided on its own peculiar facts, is to establish a rule to be applied to those facts. The cases cited by Petitioners do just that. They show beyond question that the decision is to be controlled by the bona fide intention of the parties as revealed by the entire record and not by three elements alone.

The Victory Tax Issue.

No further comment is required on this issue, on which there is no case authority and which is controlled by the clear language of the statute.

Conclusion.

The decisions of the Tax Court on both issues are incorrect and should be reversed.

Respectfully submitted,

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